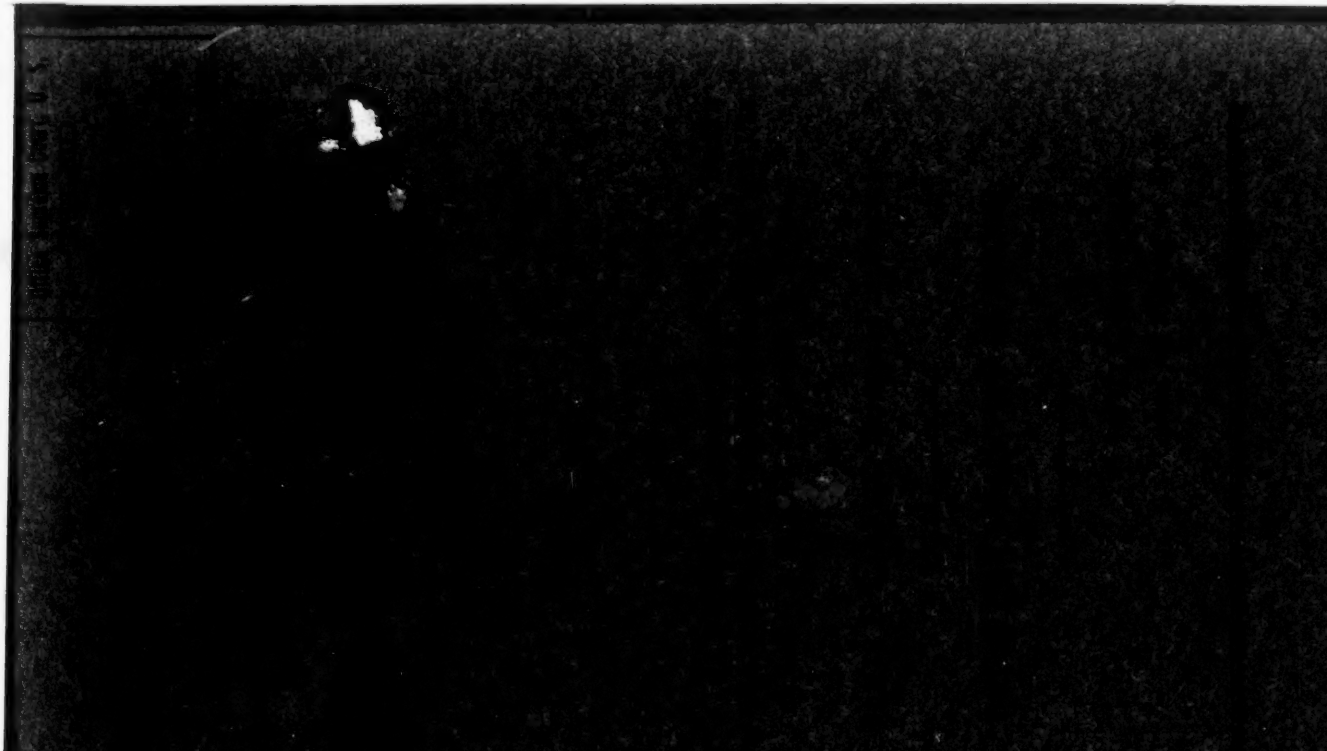

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 144.

BERTON O. WETMORE, Administrator of the Estate of Charles H. Wetmore, deceased, to the use of John F. McKay, Plaintiff in Error,

vs.

JAMES L. KARRICK, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This case comes before this court on a writ of error to the Court of Appeals of the District of Columbia, to review a judgment of said Court of Appeals which affirmed a judgment of the Supreme Court of the District of Columbia, entered for the defendant, on the overruling of a demurrer to the defendant's second plea, in an action at law founded on a Massachusetts judgment.

The suit, as indicated, is one at law, and was instituted on December 1, 1903, in the Supreme Court of the District of Columbia, upon a judgment recovered by the intestate of the plaintiff in error against the defendant in error, in the Superior Court for the County of Suffolk, in the State of Massachusetts, on November 20, 1900, for the sum of $12,881.46, besides costs, which is alleged in the declaration to remain unsatisfied. With the declaration was filed a properly authenticated copy of the record of the court in Massachusetts, and made a part thereof (R., 2).

The suit in Massachusetts, grew out of some building contracts between the defendant in error and Charles H Wetmore, deceased, the intestate of the plaintiff in error herein, and was commenced in the year 1892. *The defendant was personally served with process* (R., 15). He also appeared by attorney and pleaded to the declaration (R., 16 and 17). There was a trial by jury, who were directed to return a special verdict upon four special interrogations framed for them. The answers of the jury were against the defendant (R., 23 and 24). The defendant moved to set aside the special verdict, which motion was allowed (R., 24). The plaintiff thereupon amended his declaration by filing an additional count, and the parties went to trial again before a jury (R., 26). There was another special verdict, and also a general verdict in favor of the plaintiff in the case for the sum of $9,169.39 (R., 27). A motion for a new trial was made and overruled, and the defendant filed sundry excep-

tions to the rulings and opinion of the court in certain matters of law, which were reduced to writing (R., 28 and 29).

The record shows that nothing further was done for about four years. On June 8, 1897, at a calling of the docket under the general order of court the action was dismissed. Two days afterwards, on June 10, 1897, the order of dismissal was stricken out and the case restored to the docket (R., 29). On June 28, 1897, the attorney for the defendant entered an order withdrawing his appearance. On June 13, 1898, another attorney for the defendant, whose name appears nowhere else in the record, also entered an order withdrawing his appearance (R., 29).

The next entry is as follows:

> "Thence the case was continued to the *July sitting, 1898*, when said exceptions having been presented to the court were disallowed as not conformable to the truth, the bill not properly and correctly stating the evidence so as to fairly present the questions of law raised by the defendant's exceptions."

The following entry is:

> "Thence the case was continued from sitting to sitting into the April sitting, 1899, when on the 12th day of June 1899, at a calling of the docket under the general order of court, said action was dismissed."

The next entry reads as follows: *And now at this present October sitting, 1900, to-wit, on the 18th day of said October,*

1900, said dismissal is stricken off and the case brought forward, the same having been dismissed improvidently, action having been taken within one year, but not discovered. (R., 30).

Then on November 17, 1900, there was a motion by the plaintiff for judgment on the verdict of the jury; and judgment was accordingly entered on November 20, 1900, against the defendant for the sum of $12,881.46 and costs of suit, with award of execution. (R., 30–31.)

None of the said matters shown by the said record are denied or negatived in any way by the defendant.

A demurrer to the declaration in the Supreme Court of the District of Columbia, founded on the foregoing record, was interposed on February 20, 1904, on the following grounds: "One of the matters of law intended to be argued in support of this demurrer is that the court was without jurisdiction to render the judgment in the declaration referred to, because the case was restored to the docket after the end of the term in which judgment of dismissal had been entered therein." (R., 31.) As an additional ground of demurrer, it was orally assigned, that even if the Massachusetts court had the power to vacate the dismissal and restore the case to its docket, under the circumstances, it could not do so without notice to the defendant. This demurrer was fully argued by counsel for both parties and was considered by the court for a period of six weeks or two months. It was overruled by the court on June 23, 1904, and leave granted the defendant to plead over. (R., 32.) The opinion of the Chief Justice of the Supreme Court of

the District of Columbia overruling said demurrer is set out in full further on in this brief.

The defendant, on July 13, 1904, filed two pleas to the declaration: (1) The general issue *of nul tiel record;* and (2) a special plea wherein he sets forth that, on June 12, 1899, the cause against him in Massachusetts was dismissed; that, under the rules of the court, that dismissal became final on the first Monday of July, 1899; that the cause remained so dismissed for more than five terms of the court, until October 18, 1900; that in the meantime, on April 29, 1899, the defendant filed his petition in bankruptcy in the District Court of the United States for the District of Colorado, in which, in his schedule, he enumerated the debt due to said Charles H. Wetmore, and was by the said district court, on June 23, 1899, discharged from all debts provable against him in bankruptcy, wherein was included the debt here sued on; that subsequently to the discharge, as aforesaid, he made inquiry of the clerk of that court as to the condition of the suit, and was informed that the same was no longer pending; that relying upon this statement he took no steps in that court to suggest his discharge in bankruptcy; that the action in Massachusetts was sought to be restored to the docket of the court in that State, without summons, citation, or notice of any kind to the defendant, or to any one for him, and without his knowledge; and that the court had no jurisdiction in the premises to render such judgment. (R., 32 and 33.)

There was a joinder of issue by the plaintiff on the defendant's first plea, and a demurrer to the second. The grounds for said demurrer were as follows:

"First: That the jurisdiction of the Massachusetts court over the original suit and the parties thereto, and the power of said court to render judgment sued on herein, were in no way affected by the institution of the bankruptcy proceedings by the defendant, his adjudication as a bankrupt and his discharge prior to the rendition of said judgment by said court."

"Second: That the defendant's discharge in bankruptcy having been granted before the rendition of the judgment sued on herein, does not constitute a defense, and cannot properly be pleaded as a defense, to this suit."

"Third: That the defendant was not entitled to notice of the restoration of the original suit to the docket of the Massachusetts court, the said suit having been inadvertently dismissed through a mistake of fact of said court, and restored to the docket by said court for reasons apparent of record, no new thing being brought upon the record" (R., 35 and 36.)

The said demurrer was fully argued by counsel for both parties and was sustained by the court after several weeks consideration. (R., 36.) The opinion of the learned Associate Justice of the Supreme Court of the District of Columbia, sustaining said demurrer, appears at pages 36 to 41 of this record. From the order sustaining said demurrer the defendant, on January 6, 1905, was, on petition, allowed a special appeal to the Court of Appeals of the District of Columbia. (R., 41.) This appeal was argued by counsel for both parties, and on April 17, 1905, the interlocutory order appealed from

was reversed, the court below directed to vacate said order, and to enter an order overruling the plaintiff's demurrer, with leave to the plaintiff to plead over and for further proceedings. (R., 44, 45.)

The opinion of the Court of Appeals of the District of Columbia appears at pages 49 to 60 of this record.

On May 16, 1905, the Supreme Court of the District of Columbia entered an order overruling the plaintiff's demurrer to the defendant's second plea; thereupon, the plaintiff elected to stand upon said demurrer, and, upon motion of the defendant, final judgment was entered for the defendant. The plaintiff appealed to the Court of Appeals of the District of Columbia (R., 46).

On October 10, 1905, the case was submitted for the consideration of said Court of Appeals without argument and on the printed record (R. 49). On October 12, 1905, the judgment below was affirmed (R., 60). The opinion appears at page 49 of this record.

A writ of error to review said judgment of the Court of Appeals of the District of Columbia in the Supreme Court of the United States was sued out on October 18, 1905. The case is now here on said writ of error.

ASSIGNMENTS OF ERROR.

The Court of Appeals of the District of Columbia erred—

1. In affirming the action of the Supreme Court of the District of Columbia in overruling the demurrer to the second plea and rendering judgment for the defendant (R., 46).

2. In holding that the action of the Superior Court of Suffolk County, in the State of Massachusetts, in striking out the judgment of June 12, 1899, dismissing the suit between the parties to these proceedings, and rendering on November 20, 1900, the judgment herein sued on for the plaintiff and against the defendant, without notice to the defendant, was without jurisdiction and was null and void (R., 59 and 60).

POINTS AND AUTHORITIES.

The judgment of dismissal of June 12, 1899, having been entered improvidently through a mistake or oversight as to an entry of record, the Massachusetts court did not thereby lose jurisdiction, and had the power to vacate the dismissal and restore the case to the docket after the term.

This is the first proposition which naturally arises on this record. That the judgment of dismissal was entered improvidently, and through the failure to discover that action had been taken in the case within one year, does not admit of any doubt. It was so found by the Massachusetts judge who dismissed the case and afterwards reinstated it, and an examination of the record shows the same thing (R., 31). It is nowhere denied by the defendant in error.

The plaintiff in error does not wish to be understood as questioning, in any way, the proposition that a final judgment, entered regularly and not through mistake or inadvertence, cannot be vacated after the expiration of

the term at which it was rendered, *either with or without notice,* and that this rule applies to judgments of dismissal as well as to any other final judgments. The reason is that jurisdiction is lost after the lapse of the term under such circumstances. But a well known exception to this general rule is that a judgment of dismissal based upon mistake or inadvertence, such as appear in this record can be set aside after the term, and that is the proposition with which this court is concerned in this case. The reason is that jurisdiction is not lost by a dismissal by mistake. This is one of the exceptions to the general rule that has been recognized in the decisions of this court for nearly a century.

The first case in this court in which it was held that a dismissal by mistake can be vacated after the term is *The Palmyra,* 12 Wheat., 1. In that case a libel in admiralty was filed against the brig *Palmyra.* A decree was pronounced restoring the brig to the claimants without damages for the capture, injury or detention. The case finally reached this court on appeal. The appeal was dismissed because it appeared from the record that there was no final decree. At the next term of the court it was shown that an imperfect record had been transmitted to this court, the final decree having been omitted through inadvertence. The cause was reinstated. It was contended that the court had no power to reinstate the case after the dismissal and the expiration of the term. Mr. Justice Story, who delivered the opinion of the court, said (p. 10):

> "Every court must be presumed to exercise those powers belonging to it which are necessary for the promotion of public justice, and we do not doubt that *this court possesses the power to reinstate any cause dismissed by mistake.* * * * The reinstatement of the cause was founded, in the opinion of this court, upon the plain principles of justice, and *is according to the known practice of other judicial tribunals* in like cases."

It certainly cannot be contended that a judgment dismissing an appeal is not a final judgment after the term. That matter has been decided too often. Nor can it be contended that the court did not *intend* to dismiss the appeal in said case. The plaintiff in error invites this court's attention to this feature, as the opinion of the court below limits the Massachusetts court's power, after the term, to the correction of mistakes of the clerk, and the like, and denies it the power to correct after the term judgments which were intended though based on clerical mistakes (R., 55).

A case which was cited by counsel for defendant is error, in the court below, against the *Palmyra* case is that of Rice *vs.* Minn, & N. W. R. R. Co., 21 How., 82. It will be observed that this court in that case merely held that when a record has been brought up by a writ of error the writ after the term becomes *functus officio*, and if the parties desire to bring the record of the case again before the court it must be done by another writ of error. It was also said, "The former writ is not returnable to the present term and cannot therefore, according to the principles which govern this common-law writ, bring the record

before us." Morever, the case was regularly before the court at the previous term and was passed upon with full consideration and not through inadvertence or by mistake. The *Palmyra* case was not overruled nor was its reasoning questioned, but it was held not applicable to writs of error. Besides, it will be seen by the case of Alviso *vs.* U. S., 6 Wall., 457, a later case and one identical in principle and most similar in circumstances to the *Palmyra* case, that this court expressly followed the *Palmyra* case and commented upon it with approval. It will also be observed in this later case that the judgment of dismissal while based upon a mistake, was the judgment this court *intended* to enter, nevertheless it was vacated after the term.

In almost every case in which the rule is laid down by this court that judgments cannot be vacated after the term, judgments of dismissal by mistake are excepted. See Phillips *vs.* Negely, 117 U. S. 665, and cases therein cited. On page 674 the court said:

> "No principle is better settled, it was said n Sibbald *vs.* the United States, 12. Pet., 488, 492, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes (Cameron *vs.* McRoberts, 3 Wheat., 591; Bank of Kentucky *vs.* Wistar, 3 Pet., 431); *or to reinstate a cause dismissed by mistake.* (The *Palmyra*, 12 Wheat., 1)."

And on page 678:

> *"We are of opinion, and so decide, that after the term at which they were rendered the power of the cour over the parties and over its record remains only in the excepted cases already noticed, * * *."*

It thus has been definitely decided by this court that the jurisdiction or power of a court over the parties and its records is not lost in the excepted cases, and that a judgment of dismissal by mistake is one of the exceptions. This seems to be conclusive of the case now before this court, for if the Superior Court of Suffolk County did not lose jurisdiction over the parties and the subject-matter, after the lapse of the term, by the judgment of dismissal by mistake, then it had jurisdiction over them, and that is the only point raised by the defendant's second plea, and the Supreme Court of the District of Columbia was bound to enforce the judgment of the Superior Court of Suffolk County when sued on in said court, and this it did until its judgment sustaining the demurrer to the defendant's second plea was reversed by the Court of Appeals of said District. Moreover, it has often been decided by this court that if the court from which the record comes had jurisdiction at the time the judgment was entered, no matter how irregular or erroneous that judgment may be, it is the court's duty to enforce the judgment under the provisions of Art. IV., Sec. 1 of the Constitution of the United States. The bankruptcy features of said plea have no bearing on this proposition, as will be shown further on in this brief. In

fact the contention that they have seems to have been abandoned by the defendant in error.

Other United States courts recognize the exception contended for by the plaintiff in error. See City of Manning *vs.* German Ins. Co., 107 Fed. Rep., 52. This case was decided by the United States Circuit Court of Appeals, Eighth Circuit, on March 11, 1901. In the opinion on page 56, the court said :

> " The decisions of the Supreme Court are controlling authority in this court. A careful examination and review of them discloses the fact that the uniform rule of that court is that judgments at law cannot be vacated or substantially modified by the courts which rendered them, subsequent to the expiration of the term at which they were entered, in the absence of motions or proceedings for that purpose during such terms; and the only exceptions to that rule are that clerical mistakes, such mistakes of fact not put in issue or passed upon as may be corrected by writ of error *coram vobis* or motion in lieu of that writ, *and mistakes in the dismissal of a case, may be corrected after the expiration of the term.* The case before us falls under the rule, and not under the exceptions. There was no *error of fact or mistake of clerk, court, or counsel* in the proceedings at the May term, 1899."

And that the courts of Massachusetts have the power to vacate final judgments based upon mistake after the term, and that they exercise it, see the case of Capen *vs.* Stoughton, 16 Gray, 364. Justice Bigelow, who delivered the opinion of the court, said :

> "If the facts stated in the petition are true, it is clear that the *order* of the court of common pleas, accepting the verdict of the jury and ordering it to be certified to the county commissioners, *was improvidently made through mistake of counsel*, and that very great injustice would be done if the error could not be in some way corrected. We think it equally clear that the court had the power at *a subsequent term*, in the exercise of a judicial discretion, on satisfactory proof that *an erroneous entry had been made on the docket through mistake*, to order the case brought forward for the *purpose of vacating the previous erroneous order*, and making such disposition of the case as the rights of the parties might require."

It will be seen from this case that the Massachusetts court *intended* to make the ord er or judgment which was subsequently vacated after the te rm, and that said court held that it had the power to vacate such order because based upon mistake. Yet the Court of Appeals of District of Columbia holds that the Massachusetts court, in the present case, had no such power, and that its power extends only to the correction of clerical mistakes and not to judgments based thereon.

It is obvious that this court in this case is only concerned with the *power* of the Massachusetts court to vacate the dismissal and reinstate the cause, and not with whether it was done wisely or prudently. In the Board of Commissioners of Lake Co. *vs.* Platt, 79 Fed. Rep., 567, it was said that the test of the jurisdiction of a court is whether or not it had power to enter upon the inquiry; not whether its conclusion in the course of it was right or wrong. (See also Voorhees *vs.* Bank of U. S.,

10 Pet., 449). And this is especially true in case of a collateral attack. (See Laing *vs.* Regney, 160 U. S., 531, and cases therein cited.) As the Massachusetts court in this case had the power to vacate the dismissal and reinstate the cause, the judgment sued on cannot be declared a nullity. The proper remedy, if the defendant in error conceived himself in any way injured, was for him to proceed by a direct attack in the courts of Massachusetts against the judgment. He had the right so to do under the laws of Massachusetts. See Revised Laws of Mass., Ch. 193, Sec. 22, which reads as follows :

> "After the entry of final judgment in a civil action in the supreme judicial court, the superior court, or a police, district or municipal court, the court in which the judgment was entered may, upon petition, grant a writ of review. After the entry of final judgment by a trial justice, the superior court may, upon petition, grant a writ of review. *If the judgment was rendered in the absence of the petitioner and without his knowledge, the petition shall be filed within one year after the petitioner first had notice of the judgment;* otherwise, within one year after the judgment was rendered. In the supreme judicial court or in the superior court, the petition shall be filed in the county in which the judgment was entered."

Thus it will be seen that the defendant in error, under the laws of Massachusetts, could have applied for a writ of review at any time within one year after he first had notice of the judgment sued on herein, the same having been entered without his knowledge, irrespective of the lapse of time after the entry of said judgment.

The power to vacate judgments entered by mistake or through an oversight is exercised in other States (See Murray *vs.* Derrick, 101 Ga., 113). In that case judgment was entered against the defendant at one term, execution was issued, and the amount of the judgment paid under protest. Several terms thereafter the judgment was vacated on motion, the judge overlooking the fact that the defendant (a justice of the peace) had been excused from attendance on the court. An appeal was taken. The appellate court said, p, 116:

> "The attention of the circuit judge having been called to the absence of the defendant, upon leave, at the time of the rendition of the judgment against him, he, upon motion, set aside this judgment. We think this was a wise exercise of the discretion with which he was invested. To have done otherwise would have been to have perpetrated a gross judicial fraud upon the defendant; and we therefore approve the ruling of the trial judge.
>
> (See also Portis *vs.* Talbott, 33 Ark., 218).

In the courts below counsel for the defendant in error cited the cases of Wood *vs.* Payea, 138 Mass., 61, and Pierce *vs.* Lamper, 141 Mass., 20, to show that after the term final judgments cannot be set aside. It was so held in these cases, as it has been held in many others, and the plaintiff in error does not doubt the correctness of said decisions. But it will be observed that the judgments sought to be vacated were regular and not based upon mistake. The exception contended for was recognized. See Wood *vs.* Payea, 138 Mass., 62, where the court said:

> "While it may correct any misprision of the clerk, or *other mistake*, it cannot vacate a final judgment, entered, *without any error or mistake*, in accordance with the order of the court (Mason *vs.* Pearson, 118 Mass., 61, and cases cited)."

Moreover, these cases were *direct attacks* to correct error, and not an effort to assail a judgment in a collateral proceeding. This feature will be noticed further on in this brief.

If the Massachusetts court did not lose jurisdiction by the dismissal by mistake and the lapse of the term, as this court has often held, then of course said court had jurisdiction, and even if under the practice of the Massachusetts courts, which does not appear, and the presumption would be against it, it was requisite to notify the defendant of the motion for judgment on the verdict, the failure to give such notice would be a mere irregularity and not a jurisdictional defect.

II.

The judgment of dismissal of June 12, 1899, was founded upon a mere clerical mistake of the clerk, or, at the most, upon a clerical mistake of the judge, and a judgment so entered can be vacated at any time.

This proposition is involved in the one that has just been examined, but is here considered separately to promote clearness of discussion.

That said judgment was founded upon a clerical mistake or misprision seems plain. The court did not undertake to make a judicial determination of the suit

There was no hearing, only a *pro forma* dismissal, based upon an oversight or mistake as to an entry. And the mistake on which said order was founded must have been that of the clerk either in recording the minutes, or in reading the record. The judge, on the calling of the docket under the general order of court, certainly did not read through the record of each case to ascertain if action had been taken within one year. He was obliged to depend upon, and as a matter of practice in the courts of Massachusetts, does depend upon the information given him by the clerk. There is no claim in the defendant's plea, or elsewhere, to the contrary, and this court will assume that such was the fact if it is necessary to do so to give validity to the act of the judge in vacating said dismissal. This is on the principle that when a foreign judgment of a court of competent jurisdiction is brought into question it must be assumed that everything that was done by the court in that suit was regularly and legally done, and that such judgment is valid. (Westervelt *vs.* Jones, 5 Kans. App., 35; Freeman on Judgments, Sec. 135a; Vol. 13, Am. and Eng. Ency. of Law (2d ed.) 987.) And also because a plea to the jurisdiction must *negative* by certain and positive averments every fact on which jurisdiction can be legally predicated; and if by any reasonable intendment the facts alleged in the plea can exist and the court rendering the judgment could still have had jurisdiction the plea is bad. (Vol. 11 Enc. of Pl. and Pr., 1160, and cases there cited).

It was said by the learned associate justice of the

Supreme Court of the District of Columbia, who sustained the demurrer to the second plea (R., 40):

> "For the foundation of all such general orders of dismissal, the court is obliged to rely upon the accuracy of its recording officer to keep it informed of the condition of the record; and if the court acts on the assumption that the record states one fact, when it actually states another, which would require a different order or judgment, it can, with apparent good reason, attribute the erroneous order made to the mistake of the clerk, either in recording the minutes or in reading the record."

It has been pointed out in Section I of this brief, that the power of the Massachusetts court is not limited merely to the correction of clerical errors pure and simple, but extends to the correction of judgments based thereon, even though the judgments were *intended*. *The Palmyra*, 12 Wheat., 1; Alviso *vs.* U. S., 6 Wall., 457; Capen *vs.* Stoughton, 16 Gray, 364; City of Manning *vs.* German Ins. Co., 107 Fed. Rep., 52; Phillips *vs.* Negeley, 117 U. S., 665.

The following cases also bear out this contention:

In Sheepshanks *vs.* Boyer, Baldwin's C. C. R., 462, a judgment entered at a previous term, was stricken out on motion of an attorney representing that he had ordered his appearance to be entered by the clerk, who had neglected to make the entry.

In Sherburne *vs.* King, 2 Cr. C. C. R., 205, it was held that an action of replevin discontinued by the non-appearance of the defendant at the first term, may be

reinstated at the next term, if the omission to enter the appearance was the error of the clerk.

In McCormick's Lessee *vs.* Magruder, 2 Cr. C. C. R., 228, a judgment was entered at December term, 1819, against the casual ejector by default, and a writ of *habere facias* issued returnable to the April term, 1821. At this term Mr. Taney moved to quash the execution and rescind the judgment, upon affidavits that Mr. Marbury had ordered the clerk to enter his appearance before the judgment was entered, but the clerk, by mistake, had entered it in another cause, and the court granted the motion, quashed the execution and rescinded the judgment.

Can it possibly be contended that the judgments were not intended in any of the foregoing cases? They were intended, but they were vacated after the term because founded on clerical mistakes. And why did the courts have power to vacate them? Because, as this court has repeatedly said, jurisdiction is not lost over the parties and the record under such circumstances. They are exceptions to the general rule. And if jurisdiction was not lost over the parties and the subject-matter in the case now before this court, then the judgment of the Court of Appeals of the District of Columbia should be reversed, as that is the only point raised on this record.

Now suppose the judgment of dismissal, so often referred to herein, cannot be attributed to the mistake of the clerk in not properly recording the minutes or in reading the record, though why not is not at all apparent, then it was certainly due to a clerical mistake of

the judge in not properly reading the record—the entry was there but he failed, at the time, to discover it.

That clerical mistakes of the judge stand on the same footing as those of the clerk does not admit of doubt. Black on Judgments, Sec. 328:

> "A judgment which was *inadvertently* or irregularly entered by the *judge* or the clerk without any authority may be vacated at any time * * * (and cases cited)."

In Chase *vs.* Whitten, 62 Minn., 498, it was said:

> "It is also apparent to us from the record, and particularly from the language of the order for judgment on the pleadings, that all the court intended to do was to order judgment declaring the foreclosure void; that its judicial mind never assented to the proposition that the mortgage was void, but that the order was worded as it was *through the clerical mistake or inadvertence of the judge* by reason of his not knowing or having presently in mind the fact that the prayer of the complaint for relief asked that the mortgage itself be adjudged void. We think the court had the power to correct in this way *its own clerical mistake or misprision* so that the judgment might conform to what the court intended it should be (McClure *vs.* Bruck, 43 Minn., 305). In as much as the court has this inherent power, even on its own motion, to correct its own records, the question whether the defendant was or was not negligent in setting this power in motion is not material."

See also Morrison *vs.* Stewart, 21 Ill., App., 113.

III.

The judgment of dismissal of June 12, 1899, being irregular and entered contrary to the practice of the Massachusetts court, said court had the power to set aside said dismissal and reinstate the cause, notwithstanding the expiration of the term.

That said judgment of dismissal was irregular and entered contrary to the practice of the court is perfectly plain (R. 31), and is not denied by the defendant in error. Under the practice of the court as shown by the record, the cause should have been dismissed under the general order *only* when action had not been taken therein within one year. It was irregularly dismissed contrary to this practice.

An irregular judgment is defined to be a judgment that was rendered contrary to the law or practice of the court. 1 Tidd's Pr., 512.

In Dick *vs.* McLaurin, 63 N. C., 185, it was said :

> "There can be no doubt of the power of a court to set aside an irregular judgment at any time after it is rendered."

See also Union Bank of Georgetown *vs.* Crittenden, 2 Cr. C. C. R., 238.

In Stacker *vs.* Cooper Circuit Court, 25 Mo., 401, it was held, where a judgment is regularly rendered it cannot be set aside at a subsequent term ; where, however, it is irregular, the court may at a subsequent term correct the irregularity ; and that after an order of ref-

erence in a cause is made, and while it is still standing unexecuted and in force, final judgment in the case should not be rendered; if so rendered, the court may, at a subsequent term, recall the same and set it aside.

See also Hunt *vs.* Yeatman, 3 Ohio, 16, wherein the court said:

> "*The power to set aside a judgment, for manifest irregularity in entering it, is exercised by all the courts of justice.* And this power is exercised, not merely at the term in which the judgment is rendered, but at a *subsequent term.* To alter or amend a judgment otherwise regularly entered is a very different thing from setting it totally aside for irregularity. The majority of the court entertain no doubt that the city court might in a proper case set aside a judgment entered at a previous term."

Black on Judgments, Sec. 326.

> "It is a general rule that the court in which a judgment was rendered may vacate it, on motion, *at the same or a subsequent term*, on proof that it was entered irregularly and not according to the course of the court * * * (and cases cited)."

No notice is required to vacate an irregular judgment at a subsequent term. Nave *vs.* Todd, 83 Mo., 601. This case was an action of ejectment; plaintiff's title consisted of a mortgage and a sheriff's deed made upon foreclosure proceedings; default and a final judgment were entered at the September term, 1863; at the March term, 1864, on motion and *without notice*, this judgment was set aside so far as final and allowed to stand as an interlocutory

judgment by default, which was then made final. The foreclosure was made under an act by which final judgment should have been entered at the next term after the default was taken. The court said, page 606:

> "To thus enter the final judgment at the same term, was *an irregularity which appeared upon the face of the record.* Such irregularities may be corrected by the court at a *term subsequent* to that at which the judgment is rendered. (Stacker *vs.* Cooper Circuit Court, 25 Mo., 401; Harbor *vs.* Pacific R. R. Co., 32 Mo., 423; Downing *vs.* State, 43 Mo., 390). The first final judgment was not void, and a motion was the proper method of reaching the irregularity. (Branstetter *vs.* Rives, 34 Mo., 318; Lawther *vs.* Agee, 34 Mo., 372; Sims *vs.* Gray, 66 Mo., 616). The court had the *power* and was *in duty bound* to make the correction, and *we see no reason why notice should have been given to defendant.* * * * *Certain it is, the judgment as corrected and finally entered up is not void, and that disposes of the question between these parties in this collateral proceeding.*"

The subject of "notice" will be treated more at length in the next section of this brief.

IV.

The defendant in error was not entitled to notice of the vacation of the dismissal and the reinstatement of the original suit to the docket of the Superior Court of Suffolk County, in the State of Massachusetts, the said suit having been inadvertently dismissed through mistake

and reinstated on the docket by said court for reasons apparent of record, no new thing having been brought before the court; and even if notice was required, the absence of it affords no ground for assailing the judgment sued on herein in a collateral proceeding such as the present one.

The two subdivisions of this proposition can be well considered together.

It might be advisable to here repeat what has been said many times before, that if the Massachusetts court did not lose jurisidiction it had jurisdiction, and notice to the defendant in error was not necessary to confer jurisdiction when said court had never lost it by the entry of the judgment of dismissal founded on a mistake. It seems to be wholly unnecessary to consider this subject in view of the decisions of this court already referred to herein. But in the event that the plaintiff in error should be mistaken in this respect, authorities will be mentioned in support of the proposition above set out.

In Odell *vs.* Reynolds, 70 Fed. Rep., 656, the points involved were directly presented to and decided by the United States Circuit Court of Appeals, sixth circuit.

The court said :

> "The first question to which we shall give attention arises upon the objection of the defendant to the entry made by the Superior Court of Cook County on the 26th day of February, 1893, in correction and amendment of the judgment it had rendered on the 18th day of April, 1892, The grounds

of that objection, as stated by counsel for defendant in error in argument, are: First, that the court had no power to make the order, for the reason that the term at which the judgment was rendered had expired; and, secondly, that the order was made without any notice to the defendant of the proposed action, and without his knowledge. * * * On the contrary, it is a power inherent in the authority of every court having general jurisdiction to correct errors in the making up of its record whereby they fail to express the truth in regard to its proceedings. And the power may be exercised by the court at any time when the error is brought to its attention, and no injury is likely to happen to the parties or other persons by its exercise. No doubt such power should be cautiously and discreetly used but *that it exists is well established by authority. It is the settled doctrine of the English courts, and in most of the courts of this country.* * * * In the present case counsel for the defendant submit as a vital objection to the action of the Illinois court in making the entry for correction of February 26, 1893, that 'to make that finding and to insert it in the judgment *nunc pro tunc*, was to materially add to and substantially modify the judgment that was rendered at the prior term; for it involved the very character and scope of the agency to which alone Reynolds had committed the right to enter his appearance and confess judgment.' *But the consequence of the correction is no test of the power of the court to make it.* In Wight's case, just cited, the effect of the entry was to annihilate the whole foundation on which his petition rested. * * * Sometimes the propriety of such action exists in cases *where the correction may be made upon that which appears in the record*

itself, and is necessary to make it consistent and harmonious one part with another. In other cases it is necessary in the interest of justice to act upon matters not appearing from the record; for example, things resting in the recollection of the judge, or evidence adduced *aliunde. In the former case notice to parties is not necessary. No new thing is brought upon the record.* The court, for the clearer and more accurate expression of its final action molds into form that which is fairly and reasonably deducible from the whole record, taken together. *There is nothing to litigate. No right is substantially affected* (Free., Judg., Sec. 72*a*, 1 Black., Judg., Sec. 164; Emery *vs.* Whitwell, *ubi supra*; Matheson's Adm. *vs.* Grant, 2 How., 263). In the latter case the question of the necessity of notice may depend upon the source from which the evidence comes upon which the action is to be taken. If it is the recollection of the court, it is doubtful whether notice is required, for the reason that it is not open to contest. At all events, it would seem, upon the authorities, that corrections of the record made *by the court upon its own recollection would not be collaterally assailable though made without notice.*"

Here it was plainly decided that when the necessity for the correction, and what the correction should be, appear on the record, as they do in the case now before this court, there is no occasion for notice to the defendant, as there is nothing to litigate, no new thing being brought upon the record. The action of the court cannot be gainsaid, and the effect of the correction is no test of the power of the court to make it.

The court below endeavors to show that the reasoning in the above case does not apply to this case. The opinion of said court reads:

> "* * * but it is equally plain that the ruling of the court was not intended to extend to cases where any right was to be substantially affected or where any of the parties were likely to be injured by the proposed correction. Now, it is difficult to conceive of any case where a right was more substantially affected or where one of the parties to the case was more seriously injured than the case now before us." (R., 58.)

How was the defendant in error injured, or what right of his was substantially affected? He had the right, on any proper showing, under the statutes of Massachusetts, herein before set out, to file a petition in the Superior Court of Suffolk County at any time within one year after he first had notice of the judgment, no matter how long a time had elapsed from the rendition of said judgment. He also had the right of appeal. If he thought himself injured, why did he not apply to the Massachusetts court for redress? It is the remedy which would most naturally suggest itself to any one. He was not injured. Was he deprived of his right to plead his discharge in bankruptcy in the Superior Court of Suffolk County, in the State of Massachusetts? No. That matter has been decided by this court in the case of Dimock *vs.* Revere Copper Co., 117 U. S., 559. In that case the plaintiff recovered a judgment on April 1, 1875, in the Superior Court of Massachusetts for Suffolk County (the

very same court out of which came the record in the present case); in June, 1874, the defendant was adjudicated a bankrupt; on March 26, 1875, he was discharged by the bankruptcy court, and in March, 1879, suit was commenced on said judgment in New York, and the defense of a discharge in bankruptcy was interposed.

This court said, on page 565:

> "So here, if Dimock had brought his discharge to the attention of the superior court at any time before judgment it would have been received as a bar to the action. *and under proper circumstances, even after judgment, it might be made the foundation for setting it aside and admitting the defense* (Ray *vs.* Wight, 119 Mass., 426; Page *vs.* Cole, 123 Mass., 93; Golden *vs.* Blaskoff, 126 Mass., 523). *Nothing of the kind was attempted.*" The same rule has been applied elsewhere (Sands *vs.* Perry, 38 Hun., 263).

What right did the defendant in error lose? He lost none. Why his strange reluctance to move in the Massachusetts courts? He wants the courts of this district and this court to infer everything in his favor in regard to his discharge in bankruptcy without giving the plaintiff in error an opportunity to show that said discharge in bankruptcy does not constitute a defense to the judgment of the Massachusetts court. The plaintiff in error can show in a proper proceeding that the said discharge in bankruptcy does not constitute a release of or defense to the said judgment. None of the matters alleged in the second plea of the defendant in error in regard to his adjudication as a bankrupt or his discharge in bankruptcy has any bearing on the jurisdiction of the

Massachusetts court to enter the judgment herein sued on, and that is the only point raised by said plea. And such contention has been abandoned by the defendant in error. Nevertheless it will be shown further on in this brief that said allegations do not affect the jurisdiction of the Massachusetts court to enter said judgment.

The case of Odell *vs.* Reynolds was cited with approbation in the case of Groton Bridge and Mfg. Co. *vs.* Clark Pressed Brick Co., 126 Fed. Rep., 552. This case was decided on November 20, 1903.

The court, on page 555, said:

> "It might well be asked, of what benefit would notice be to a party if the order is made upon the personal recollection of the trial judge, and for this reason is not open to contest? But, without determining that question, I hold that, even if it was error to make the amendment without notice, it could only be corrected by appeal, and does not subject the action of a superior court to collateral attack."

And, as has been said before herein, this court is concerned only with the *power* of the Massachusetts court, that is, its right to enter on the inquiry, which is synonymous with jurisdiction. Said court did not lose jurisdiction.

In Wight's case, 134 U. S., 136, cited in the opinion rendered in Odell *vs.* Reynolds, the consequence of the order entered after the term was to give the district court jurisdiction, where, without the order, it had none; and the entry of the order annihilated the petitioner's case and, moreover, it was a criminal case.

The court said, on page 145, quoting the law as laid down by the Supreme Court of Minnesota:

> "And while we admit the power to amend a record after the term has passed in which the record was made up, we deprecate the exercise of the power in any case where there was the least room for doubt about the facts upon which the amendment was sought to be made. * * * *But when the facts stand undisputed*, and the objection is based upon the technical point alone that the term is passed at which the record was made up, it would be doing violence to the spirit which pervades the administration of justice in the present age to sustain it."

This case was cited in the court below to show that the consequence of the order entered after the term is no test of the power of the court to make it, and to show that the courts do possess the power to correct their records after the term, especially when the facts stand undisputed, and the reason for the correction and what the correction should be appear upon the record, as in the present case. See also Rhoads *vs.* Commonwealth, 15 Penn. St., 276.

There is no doubt, of course, where the correction of the record is based upon evidence *aliunde*, the defendant should be notified, so as to give him an opportunity to controvert the new matter.

Black on Judgments, Sec. 134.

> "* * * In general, we may say that the necessity of notice of such an application must depend upon the sources which are to furnish the evidence

of the judgment to be entered. *If the examination is to be confined to the record, the presence of the defendant could not affect the result, nor would he have room to contest it.* But if it is to be based on extraneous proof, it is but just that he should have an opportunity to prepare countervailing testimony."

See also Freeman on Judgments, Sec. 142.

In Emery *vs.* Whitwell, 6 Mich., 474, it was held that notice is only necessary when the nature of the error and the appropriate amendment depend on *matters not apparent on the face of the record, but shown aliunde.*

See also—

Nave *vs.* Todd, 83 Mo., 601.

Emery *vs.* Berry, 48 N. H., 473.

Balch *vs.* Shaw, 7 Cush., 282.

What matters may be inquired into when a judgment is collaterally assailed? In Thompson *vs.* Tolmie, 2 Pet., 157, the court said, page 162:

"The counsel for the defendant in error here, in the argument, considered these proceedings open to the same examination and objections as they would be in an apellate court on a direct proceeding to bring them under review. This, however, is not the light in which we view the question now before us. * * * The general and well settled rule of law in such cases is, that when the proceedings are collaterally drawn in question and it appears upon the face of them that the subject-matter was within the jurisdiction of the court, they are voidable only. The errors and irregularities, if any exist, are to be

corrected by some direct proceeding, either before the same court to set them aside or in an appellate court."

See also Morse *vs.* Presby, 25 N. H., 303.

And that the Massachusetts court had the jurisdiction or power to do what it did, under the circumstances, it is believed, the cases set out under the various sections of this brief conclusively establish.

In Walden *vs.* Craig's Heirs, 14 Pet., 147, an amendment was made to the declaration by extending the demice to fifty years, after the suit had been disposed of over twenty years. It was objected that "the order itself is a nullity, made *ex parte*, on the plaintiff's motion without notice to the defendants, or to any one interested to defend; and that, after the parties to the judgment in in ejectment had been out of court for more than twenty years." The court said, page 154:

> "It is admitted that the service of process, or notice, is necessary to enable a court to exercise jurisdiction in a case; and if jurisdiction be taken where there has been no service of process, or notice, the proceeding is a nullity. It is not only voidable, but it is absolutely void. *But this is only where original jurisdiction is exercised, and not a decision of a collateral question in a case where the parties are before the court.*"

The court thus held that the parties were before the court notwithstanding a final judgment had been rendered in the cause twenty years before, and there had been no new notice to them.

In Mann *vs.* Schroer, 50 Mo., 306, it was held that where the clerk in entering up judgment on a mechanic's lien omitted to make a special judgment, the entry at the *next term* of a special judgment correcting the mistake *nunc pro tunc, without notice to the defendant* is *not such an error* as would render the judgment *void*, or could be taken advantage of in a collateral proceeding. But where the case is directly brought up by writ of error, the failure of the plaintiff to notify the defendant of his motion to correct the judgment will render it proper to reverse and remand the cause with leave to the plaintiff to renew his motion.

No notice at all is required where the reason for the correction appears in the record. See Vol. 17, Am. & Eng. Ency. of Law (2d ed.), 823.

It might be well now to examine the cases cited in the courts below by the defendant in error relating to the proposition under consideration. The plaintiff in error wishes to reiterate what has been said before herein, that it is not contended by him that a *regular* final judgment, whether of dismissal or otherwise, not based upon *mistake*, in the absence of statute, can be vacated after the term, *either with or without notice.*

In Morgan *vs.* Campbell, 54 Ill. App., 242, the dismissal was not based upon a mistake, nor was it irregular, nor was it the result of a clerical misprision. The case clearly fell within the general rule, and not within the exceptions, as laid down by this court. Moreover, its vacation was sought upon motion based upon *affidavit*, and notice was, of course, required to give the opposite

party an opportunity to offer "countervailing testimony." Also it was a *direct attack* in the very same case, and not an attempt to make the objection in a collateral proceeding. The correctness of the decision is not disputed.

In Hetrick *vs.* Wilson, 12 Ohio St., 136, a case much relied upon by the defendant in error, the judgment of dismissal was not based upon a mistake. It was sought to be set aside on petition and *affidavit.* It was a direct attack, and the remarks concerning the preceding case apply. In addition, there is a statute in Ohio which requires notice in just such a case. See page 138 of the decision where the statute is set forth as follows:

> "The proceedings to correct mistakes or omissions of the clerk, or irregularities in obtaining a judgment or order, shall be by motion *upon reasonable notice to the adverse party, or his attorney in the action.*"

Jenkins *vs.* Corwin, 55 Ind., 22, The same applies. There was no mistake of fact. The judgment was set aside upon motion for a new trial—clearly a matter that could be litigated. It was a direct attack. The general rule obtained.

In Keeney *vs.* Lyon, 21 Iowa, 280, the judgment was sought to be set aside on motion with *affidavits.* It was a direct attack. There was no mistake of fact. It is true counsel in said case claimed that the judgment or order was based upon mistake. The court said, page 281:

> "As time passes, the mistake ought to be made

more and more manifest. * * * *No such showing is made in this case.* Parties would never be estopped by their voluntary action in a pending litigation, orders and judgments would have no sanctity, no conclusiveness, *if upon the slight evidence produced in this case* a controversy is to be reopened and again tried and determined."

Moreover, the decision contemplates that in some cases judgments may be set aside after the term, and this court is concerned with the *power* of the Massachusetts court and not with its prudent or judicious exercise thereof.

The cases of Jameson *vs.* Kinsey, 85 Mo. App., 298; Ewing *vs.* Perry, 35 Tex., 778; Smith *vs.* Wilson, 26 Ill., 187; Grames *vs.* Hawley, 50 Fed. Rep., 319, and Elder *vs.* Richmond Gold & Silver M. Co., 58 Fed. Rep., 536, were also cited by the defendant in error in the courts below. In every one of the cases enumerated the judgment of dismissal was *regular* and not based upon a *mistake*, either apparent upon the record or otherwise. Said cases all fall within the *general rule* and not with the *exceptions*, and are, therefore, not applicable to the case before the court.

It might be well to examine more closely the case of Elder *vs.* Richmond Gold and Silver M. Co., *supra*, as it appears to be the strongest case cited by the defendant in error. In that case a judgment was rendered in a district court of Colorado, dismissing the action, *but not through a mistake*, and thereafter a motion to vacate was denied. Nearly three years after its rendition, and without intermediate proceedings, the judgment was set

aside and judgment rendered for the plaintiff. It was held that the latter judgment was absolutely void, as rendered without jurisdiction, the Code of Colorado, Sec. 75, requiring that a party aggrieved by a judgment must apply for relief within six months after the adjournment of the term at which the same was rendered. Here it will be seen not only was the judgment of dismissal not founded upon a mistake, which makes the case fall under the general rule, but also that a statute of Colorado limits the time in which such a judgment can be vacated to six months after the adjournment of the term in which it was rendered, which time had more than elapsed. Not only is there no such provision in Massachusetts, but the statute there permits the review of such judgments at any time within one year after notice by the aggrieved party without regard to the lapse of time after the rendition of th judgment when the judgment was entered without his knowledge as in the present case.

It will be borne in mind that this court has expressly decided in the case of Phillips *vs.* Negeley, and in the other cases herein before referred to, that jurisdiction is not lost over the cause or the parties by the expiration of the term when the case falls within the *exceptions. To make the above cases applicable to the present case would be to do away with one, and perhaps two, exceptions, which are always noted in the decisions of this court on this point.*

The latest case decided in this court on the subject, which the plaintiff in error has been able to find, is Tubman *vs.* B. & O. R.R. Co., 190 U. S., 38 (an appeal from

the Court of Appeals of the District of Columbia, 20 App. D. C., 541), wherein the Chief Justice of this court said:

> "In the present case the motion to set aside was *denied* not granted, and as it was made after the lapse of the term, *and came within no exception*, the general rule was applicable."

In none of the arguments in the courts below did the defendant in error cite a case similar to the present one, where a judgment of dismissal, based upon a *mistake*, the mistake appearing in the record itself, and no evidence *aliunde* being produced, in which it was held that such judgment could not be vacated after the term without notice, even in a direct attack on the judgment, and certainly there is no such holding in a collateral proceeding.

Almost all the foregoing cases were cited by the defendant in error on the argument of the demurrer to the declaration, before the Chief Justice of the Supreme Court of the District of Columbia, and also on the argument of the demurrer to the second plea. The decision of the learned associate justice of the court below sustaining the demurrer to said plea appears on pages 36 to 41 of the record, and speaks for itself. The decision of the chief justice overruling the demurrer to the declaration was taken down stenographically and transcribed on the typewriter by counsel for defendant in error, and a copy thereof, as furnished counsel for plaintiff in error, follows:

Opinion of Justice Clabaugh Overruling Demurrer in Wetmore vs. Karrick.

"This case presents an exceedingly nice question and one that I have endeavored to give a great deal of care and investigation. Now the simple question here is this: This plaintiff sues upon a foreign judgment or a judgment of another State, and he sets out in his declaration that it is a judgment rendered by a court of competent jurisdiction, etc., and then he exhibits with the judgment the entire record of that court. Now, how far that was necessary was for counsel to determine, and that has caused the difficulty in this case. The declaration in the case has been mislaid, but at any rate I asked counsel for defendant to submit additional statement of his reasons in behalf of his demurrer, and I thought I had the paper here and I wanted to read from it. It seems that it is mislaid, too. But he bases—the theory of the demurrer is based upon the fact that the record does not show that after this case had been dismissed in Boston, and unlawfully dismissed. It seems that they have a way there of dismissing a case, as we have of placing it upon the stet calendar, if in the progress of the case some action is not taken within a certain time, and in this case it appears that the court dismissed the suit on the supposition that no action had been taken in the case within the time, dismissed it as a matter of course, I assume. Now, that being so, when the court's attention was directed to the fact that some action had been taken within the time it struck out this dismissal and reinstated the case. Now, the contention of counsel is that the court had no right to do that, unless the record

affirmatively showed that the other party, the defendant in the case, had had notice of the fact of the reinstatement of the case. As I read the law, where a court record comes properly authenticated, showing a judgment of a court of competent jurisdiction and it shows that both the subject-matter and the party defendant were subject to the jurisdiction of the court, in other words that they have been summoned, that then full validity is given to that judgment when it is sued upon in another court; that is to say, that it is a *prima facie* case, at any rate. It may be shown afterwards that the party was not summoned. A defense may be put in by proof in the case, which shows that the court never had jurisdiction of the subject-matter. That will be a matter of defense; but in this case it is shown that the party was summoned. Now, the record, as I find it—but I may be mistaken in this case, it is such avery extensive record—it does not show that the party defendant was not notified of the fact of the reinstatement of the case. It seems to be silent on the subject. Now then, it seems to me that this court must conclude that the court in Massachusetts having reinstated the case and having entered a judgment on it, that it must have done so lawfully; in other words that the fact of the defendant having been brought into court and appearing by counsel, etc., that—unless it is shown subsequently that the court acted without jurisdiction—this court must assume that the Massachusetts court entered the judgment regularly and it seems to me that this is the doctrine laid down in the books. It seems to me that the Supreme Court so holds in 18th Wallace—I haven't the case, but can give it to counsel later—where the court says that every

fair intendment must be given the judgment of a court of another State when it is shown upon the face of the record that the court had jurisdiction of the subject matter and of the person. Now that is shown here. The only difficulty which arises in this case is that the court after dismissing the case has reinstated it without notice to the other party and, therefore, having dismissed the case, the court had lost jurisdiction and could not again acquire it without notice to the parties. *Now, I think that the court which has jurisdiction of the person and thing and unlawfully or by mistake dismisses a suit which the court had no right to dismiss, but it was only done through inadvertence, I cannot think that the court has not a right to reinstate that case without notice to the other party;* but, even if that was not so, if I am wrong in that conclusion of law, still this record does not show that the other party had no notice, and, therefore, this court must assume that the Massachusetts court in entering up the judgment entered it in accordance with the law, nothing being on the record to show otherwise. Therefore, that being the case—the only question raised by the demurrer—we are not speaking of the matter of defense, because I don't know what will happen when we get to the matter of defense. I shall have to overrule the demurrer.

"June 23, 1904."

V.

The jurisdiction of the Superior Court of Suffolk County, in the State of Massachusetts, over the subject-matter and the parties and the power of said court to render the judgment

sued on herein were in no way affected by the institution of the bankruptcy proceedings by the defendant in error, his adjudication as a bankrupt, and his discharge prior to the rendition of said judgment by said court.

That the foregoing is a correct statement of the law does not admit of doubt. See Eyster *vs.* Gaff *et al.*, 91 U. S., 521, wherein the court said, page 524:

> "It is a mistake to suppose that the bankrupt law avoids of its own force all judicial proceedings in the State or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition. The court in the case before us had acquired jurisdiction of the parties and of the subject-matter of the suit. It was competent to administer full justice, and was proceeding according to the law which governed such a suit, to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however, seriously they might have affected the rights of the parties to the suit already pending. It was the *duty* of that court to proceed to a decree as between the parties before it, until by some proper pleadings in the case it was informed of the changed relations of any of those parties to the subject-matter of the suit. Having such jurisdiction, and performing its duty as the case stood in that court, we are at a loss to see how its decree can be treated as void."

See also—

Dimock *vs.* Revere Copper Co., 117 U. S., 559.

Boynton *vs.* Ball, 121 U. S., 457.

In re Davis, 1 Saw., 260.

The court below said in its opinion that,

> "It seems to be assumed by the appellee that the appellant had lost his right to plead his discharge in bankruptcy by his failure, upon the filing of his petition in bankruptcy, to ask for a stay of proceedings in the Massachusetts court" (R., 53).

With all respect to the court, the plaintiff in error (at that time the appellee below) says no such position was ever taken or assumed by him. How could it be when he contended that on a proper showing the defendant in error could have had the judgment set aside and been given leave to plead his discharge? This contention was plainly set out in the brief filed below by the plaintiff in error and two cases were cited in support thereof, Dimock *vs.* Revere Copper Co., 117 U. S., 559, and Sands *vs.* Perry, 38 Hun., 268.

VI.

The defendant's discharge in bankruptcy, having been granted before the rendition of the judgment sued on here, does not constitute a defense and cannot properly be pleaded as a defense to this action.

That this proposition is correct, see the following cases:

Dimock *vs.* Revere Copper Co., 117 U. S., 559.

Mechanics' Bank *vs.* Hazard, 9 Johns., 392.

Desobry *vs.* Morange, 18 Johns., 336.

Steward *vs.* Green, 11 Paige, 534.
Rudge *vs.* Rundle, 1 T. & C., 649.
Hollister *vs.* Abbott, 31 N. H., 442.
Bellamy *vs.* Woodson, 4 Ga., 175.
Wilkins *vs.* Warren, 27 Me., 438.
Rees *vs.* Butler, 18 Mo., 173.

The contention of the defendant in error to the contrary has been abandoned. Besides, it is certainly apparent from the second plea that the defendant in error is proceeding only on the theory that the Massachusetts court had no jurisdiction, and not that he has a defense to the judgment by way of release. If he wished to plead his discharge, he should have done so unequivocally and in an other plea.

Conclusion.

It is believed that the cases and decisions cited in this brief show that the Superior Court of Suffolk County, in the State of Massachusetts, did not lose jurisdiction of the parties or the subject-matter by its improvident dismissal of June 12, 1899, and the expiration of the term, and that the said judgment of dismissal could be vacated at any time and without notice. This was no hardship on the defendant in error. He could not gainsay the court's action. The record showed the mistake, and, if he believed himself to be prejudiced, he could have, and should have, proceeded directly against the judgment herein sued on. It seems strange that the defendant in error should lay such

stress on the absence of notice, when there was nothing to litigate, no evidence *aliunde* offered, and when he himself had put it out of the power of the plaintiff in error to give him or his attorneys notice by removing from the jurisdiction of the court and taking up his residence in Colorado and having his attorneys withdraw their appearance. Notice would have been of no help to him, and his own voluntary act made notice impossible, for surely the case was not one in which notice could be given by publication. Moreover, it will be presumed, in the absence of a contrary showing, that courts of general jurisdiction have the power they assume to exercise, and that the mode of procedure adopted by them is authorized by the laws under which they act (Westervelt *vs.* Jones, Kans. App., 35). There was no fraud practiced upon the defendant in error. The delay in entering the judgment certainly did not amount to fraud, nor did his want of knowledge of the entry of judgment (Bellamy *vs.* Woodson, 4 Ga., 175, and Miller *vs.* Clements, 54 Tex., 351). Moreover, the delay from March 3, 1894, to July, 1898, was occasioned by the non-action of the defendant in error.

And, besides, he lost no rights and he was amply protected under the laws of Massachusetts both in proceeding directly against the judgment and in pleading his discharge in bankruptcy. But no; this is not what he wants. He wishes this court and the courts of this district to infer everything in his favor, and to give the plaintiff in error no opportunity to controvert any of his contentions in the courts of Massachusetts, where, with

propriety, they only can be raised. The Superior Court of Suffolk County, in the State of Massachusetts, did not lose jurisdiction, and that is the only point before this court.

It is therefore respectfully submitted that the judgment below should be reversed.

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